ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
MARC SPITZER
Commissioner
WILLIAM MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACTS OF 1996, AND THE APPLICABLE STATE LAWS FOR RATES, TERMS, AND CONDITIONS OF INTERCONNECTION WITH QWEST CORPORATION.

DOCKET NOS. T-01051B-05-0350
T-03654A-05-0350

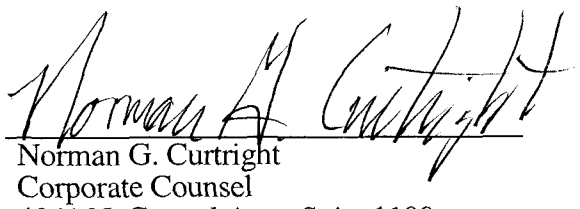
QWEST CORPORATION'S NOTICE OF THIRD FILING OF SUPPLEMENTAL AUTHORITY

On December 19, 2005, Qwest Corporation ("Qwest") filed as supplemental authority the State of Iowa Utilities Board (the "Iowa Board") Arbitration Order No. ARB-05-4, *In Re Level 3 Communications, LLC vs. Qwest Corporation,* issued December 16, 2005. Qwest hereby files notice that on January 30, 2006, the Iowa Board issued its Order Granting Reconsideration of the Arbitration Order. The Order Granting Reconsideration is attached to this notice. It is not clear whether the Board intends to reconsider matters it already ruled on or merely to resolve the issues it did not expressly decide.

On January 20, 2005, Level 3 transmitted *via* e-mail to the Arbitrator in this Arizona matter Level 3's Application for Reconsideration of the Arbitration Order in Iowa. Accordingly, Qwest hereby attaches also its Answer and Objections to Level 3's Application for Reconsideration of the Iowa Arbitration Order.

RESPECTFULLY SUBMITTED this 1st day of February, 2006.

QWEST CORPORATION

By: 

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STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: LEVEL 3 COMMUNICATIONS, LLC, Petitioner, vs. QWEST CORPORATION, Respondent.	DOCKET NO. ARB-05-4

ORDER GRANTING RECONSIDERATION

(Issued January 30, 2006)

On December 16, 2005, the Utilities Board (Board) issued an "Arbitration Order" in Docket No. ARB-05-4. The order arbitrated certain terms and conditions of a proposed interconnection agreement between Level 3 Communications, LLC (Level 3), and Qwest Corporation (Qwest). Specifically, the order arbitrated three primary issues identified as "Tier One" issues: (1) interconnection architecture and cost responsibility related thereto; (2) Virtual NXX (VNXX) arrangements; and (3) intercarrier compensation for Internet service provider (ISP) – bound and Voice over Internet Protocol (VoIP) traffic. The order noted that while Level 3 presented 17 "Tier Two" issues, these issues were described by the parties as being derivative of the Tier One issues and, as such, the Board did not discuss them individually.

Level 3 filed an application for reconsideration of the arbitration order on January 5, 2006. Qwest filed a response on January 19, 2006. The Board will grant Level 3's request for reconsideration for the purpose of allowing the Board adequate time to consider the issues raised by Level 3's application.

IT IS THEREFORE ORDERED:

The application for reconsideration filed by Level 3 Communications, LLC, on January 5, 2006, is granted for the purpose of allowing adequate time for consideration of the issues raised by Level 3's application.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 30th day of January, 2006.

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: **LEVEL 3 COMMUNICATIONS, LLC,** **Petitioner,** **vs.** **QWEST CORPORATION,** **Respondent**	**DOCKET NO. ARB-05-4**
QWEST CORPORATION'S ANSWER AND OBJECTION TO LEVEL 3 COMMUNICATIONS, LLC'S APPLICATION FOR RECONSIDERATION OF ARBITRATION ORDER	

I. INTRODUCTION

Qwest Corporation ("Qwest"), pursuant to 199 IAC § 7.27(3), hereby answers and objects to the Application for Reconsideration of Arbitration Order ("Level 3 Application") filed by Level 3 Communications, LLC ("Level 3") with the Iowa Utilities Board ("Board") on January 5, 2006. The Board's December 16, 2005 Arbitration Order ("Arbitration Order") represents the proper application of the Act, FCC Rules, prior Board decisions, and applicable state law. For the reasons set forth hereafter, Qwest requests that the Board deny Level 3's Application, deny Level 3's request for further briefing and oral argument, reaffirm its Arbitration Order, and order the parties to adopt the interconnection agreement submitted by Qwest, with Qwest's language on disputed issues.

II. ARGUMENT

A. The Board's Decisions on Issues 1A to 1D are Consistent with the Act and Rules, Iowa Law, and Prior Decisions. The Board Should Reject Level 3's Application for Reconsideration on those Issues.

1. The Board's Decision on Issue 1A Relating to Single Point of Interconnection per LATA is Correct and Should Not be Changed.

On single point of interconnection ("SPOI"), the Board was faced with a choice between Qwest's standard language from its Statement of Generally Available Terms ("SGAT") and Level 3's proposed language that was loaded with disclaimers of responsibility and slanted statements relating to issues other than SPOI. Since the Qwest language allowed Level 3 to choose a single point of interconnection and was not slanted, it was completely appropriate for the Board to adopt Qwest's language. Level 3's criticisms of the Board's decision are completely unfounded.

Level 3 first asserts that Qwest's language might be interpreted to require more than one point of interconnection and suggests that Qwest's testimony regarding the fact that CLECs often choose to interconnect at each access tandem ostensibly supports this view. Level 3 Application at 2. The testimony of Phil Linse immediately following the testimony that Level 3 relies upon refutes this assertion:

Q. So are you saying that Level 3 has to have as many POIs in a LATA as Qwest has tandems?

A. No, actually not at all... (R.1206).

Mr. Linse then explained how direct trunked transport could be built to connect tandems that are not otherwise connected. It is noteworthy that Level 3 does not quote a single Qwest contract provision that requires more than a single point of interconnection.

Level 3 next argues that adoption of Qwest's proposed contract language relating to the combination of traffic types on interconnection trunks somehow further confuses the SPOI issue. Level 3 Application at 2. However, as the Board properly found, Qwest's language does not preclude Level 3 from establishing a single POI per LATA. Arbitration Order at 9. Level 3 does not, and cannot, provide an example of a traffic type, tandem-routed or otherwise, that could not be routed through a single point of interconnection under Qwest's proposed language.

Third, Level 3 claims that as a result of Qwest's language relating to SPOI, "virtually all traffic exchanged with Qwest will be subject to access charges." Level 3 Application at 2. Stripped of disguise, Level 3's argument amounts to the completely erroneous assertion that the right to a single point of interconnection per LATA somehow excuses Level 3 from paying access charges for intraLATA long distance calls. That is simply not the law. Long distance calls are calls subject to access charges regardless of whether Level 3 chooses to interconnect at a single point of interconnection. As the FCC has stated, "access charges are not affected by our rules implementing section 251(c)(2)" pertaining to interconnection.[1] Similarly, Qwest's proposed language relating to SPOI does not in any way change the rules that govern whether particular calls are subject to access charges.

The Board's decision affirming single point of interconnection per LATA and its choice of Qwest's proposed language are completely consistent. There are no irretrievable ambiguities

[1] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶176 (1996) ("*Local Competition Order*").

between the SPOI principle and Qwest's proposed language. Further the Board did not fail to resolve open issues between the parties relating to SPOI. The only open issues between the parties concern what language to adopt. The Board chose to adopt Qwest's language relating to Issue No. 1 and its subparts.

2. Level 3 has Provided No Basis to Overturn the Board's Decision on Issue 1B Relating to Interconnection Compensation.

The Board's Order with respect to Issue 1B correctly notes that there are "different types of interconnection." Arbitration Order at 11. On this point there was no dispute. Qwest's testimony was unrebutted. A CLEC like Level 3 may interconnect using primarily (1) collocation, (2) entrance facilities or (3) a mid-span meet. (R. 1081). Qwest's proposed language addressed each of these possible methods, while Level 3's proposed language did not. Thus, it was completely appropriate for the Board to adopt Qwest's proposed language over Level 3's.

Level 3 erroneously alleges that adoption of Qwest's proposed language is contrary to the Board's decision in *LTDS v. Iowa Telecom*, ARB-05-3 ("ARB-05-3"). Level 3 Application at 4. Level 3's contention completely ignores the fact pattern in ARB-05-3. In ARB-05-3, LTDS and Iowa Telecom had in place a pre-existing interconnection arrangement in which each party had previously agreed to pay 100% of the trunking and transport costs on its side of the point of interconnection. LTDS was attempting to change that arrangement even though it was not proposing to change the manner in which it interconnected with Iowa Telecom. The Board opted to resolve the dispute between the two parties by preserving the arrangement that the parties had previously negotiated. The Board did not attempt to classify the interconnection arrangement between LTDS and Iowa Telecom.

In ARB-05-03, the Board expressly recognized that relative use arrangements are sometimes used in the industry and pointed to Qwest's SGAT to evidence that fact. In this case, since Qwest is a party and because all three types of interconnection are possible, the Board chose to adopt Qwest's proposed language that recognizes all three types of interconnection rather than

Level 3's proposed language, which does not. Arbitration Order at 11-12. What must be emphasized is that Qwest and Level 3 do not have a pre-existing agreement comparable to that which existed between LTDS and Iowa Telecom. Thus, the outcome from ARB-05-03 is not a prior precedent binding or even applicable in this proceeding.

Level 3's final point on Issue 1B appears to be a new argument not previously made to the effect that VoIP traffic should be considered a "wholesale telecommunications service," although it makes no effort to define that term. All that needs to be said on this point is that Level 3 never asserted that VoIP was a "wholesale telecommunications service." Level 3 argued, and Qwest agreed, that VoIP is an information service. Thus, if there is an inconsistency, it is an inconsistency in Level 3's advocacy. In any event, it is not a legitimate or permissible criticism of the Board's order.

3. Level 3 Fails to Demonstrate Any Board Error that Could Justify Reconsideration of the Portions of the Arbitration Order Relating to the Relative Use Factor (RUF) (Issue 1C).

Level 3 objects that the Board's approval of Qwest's proposed language relating to the Relative Use Factor (RUF) creates "serious problems." Initially, Level 3 makes the conclusory and unexplained allegation that Qwest's language is "unclear." Level 3 Application at 6. Second, Level 3 asserts for the first time that it does not want to interconnect using a method to which the RUF is applicable. Finally, Level 3 contends that the language adopted by the Board contravenes 47 C.F.R. § 51.709(b) ("Rule 709(b)"). *Id.*

Level 3's first point does not support reconsideration of the Arbitration Order. In insisting that the provisions adopted by the Board are unclear, Level 3 ignores the fact that they are substantially similar to the language contained in Qwest's SGAT and that it has been included, without objection, in countless interconnection agreements in Iowa. Level 3 fails to identify any specific ambiguity or otherwise support its claim that the language lacks clarity. Indeed, Level 3 did not even make this assertion in its post-hearing briefs.

Level 3's claim that it is not requesting interconnection under one of the methods to which RUF applies is belied by its own testimony. Mr. Greene testified in pertinent part as follows at hearing:

> We agree that when total traffic between Level 3 and a particular Qwest end office switch reaches a certain reasonable volume, we will establish a direct trunk group between that end office and Level 3. (R. 32).
>
> ***
>
> As a contractual matter, the parties agree that the cost of facilities used to connect their networks will be split based on relative use. (R. 33-34).

Moreover, nowhere in Level 3's proposed language does it expressly state that it will not request interconnection by means of entrance facilities or collocation. Finally, the necessary predicate to a mid-span meet point of interconnection is the reciprocal exchange of traffic. Since Level 3 creates a one way traffic flow by focusing on serving ISPs, the reciprocal exchange simply does not exist.

Level 3's third contention that the approved language violates Rule 709(b) is both legally incorrect and deliberately obfuscatory. Rule 709(b) provides:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

The language adopted by the Board serves to implement the concept of this rule.[2] Paragraphs 7.3.1.1.3.1 (Entrance Facilities) and section 7.3.2.2.1 (Direct Trunked Transport) start with the assumption that the flow of telecommunications traffic between Qwest and the CLEC will be equal in each direction and then allows adjustments to the fifty-fifty split based on actual use. If

[2] As this Board noted in a prior arbitration order, "relative use factors are used to designate the percentage of trunks in a trunk group that a carrier will use to carry its traffic. This factor is applied to the cost of the associated facilities in order to apportion the cost between or among the carriers." Arbitration Order, *In Re Arbitration of Qwest Corporation and AT&T Communications of the Midwest, Inc. and TCG Omaha,* Docket No. ARB-04-01, at 20, fn.32 (Ia. Util. Bd. June 17, 2004) *("AT&T Arbitration Order")*

Qwest's usage is greater than the CLEC's, Qwest will pay a greater share of the cost of the facility and the CLEC a smaller share that is proportional to its use. Qwest's language for relative use is a reasonable means of implementing the requirement that the costs of shared facilities be allocated to the CLEC based on its actual use. Indeed this or substantially similar language has been repeatedly approved by the Board in numerous other interconnection agreements and in the SGAT to implement the concept of proportional allocations of costs for shared facilities. If Level 3 were actually operating in the context of Rule 709(b) it is highly unlikely that Level 3 would object.

However, given the actual manner in which Level 3 operates, Level 3's focus on Rule 709(b) serves only to obfuscate the real issue. As the record amply demonstrates, Level 3's primary business is to serve Internet Service Providers (ISPs) whose customers use the public switched telephone network ("PSTN") to access Level 3's ISP customers. Level 3's business plan generates ISP traffic that is one-way from the Qwest network to the Level 3 network. If the Board looks at the relative use of both Qwest and Level 3 and recognizes, as it has done in the Arbitration Order and in the *AT&T Arbitration Order* that the costs of ISP traffic that the Level 3 business plan generates should not be allocated to Qwest, Level 3 will face paying for the network facilities it actually uses to serve its ISP customers, an outcome that is in compliance with federal law.[3]

Contrary to Level 3's assertion, Rule 709(b) does not prevent this result. In fact, Level 3's reliance on that rule is entirely misplaced. In its *ISP Remand Order*,[4] the FCC found that ISP related traffic "falls under the rubric of 'information access.'" *ISP Remand Order* ¶ 39. Information access is specifically excluded from the definition of "telecommunications traffic" in

[3] In implementing the Act, the FCC stated, "to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers." *Local Competition Order* ¶ 200.

[4] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*")

the FCC's regulatory scheme. 47 C.F.R. § 51.701(b)(1). Rule 709(b)'s use of the term "traffic" was held by the Colorado federal district court in *Level 3 v. CPUC* to refer to "telecommunications traffic:"

> I conclude that [47 C.F.R. § 51.709(b)] must refer to "telecommunications traffic." The first part of the relevant regulations, 47 C.F.R. § 701(a), provides that "[t]he provisions of this subpart [which include 47 C.F.R. § 51.709(b)] apply to reciprocal compensation for transport and termination of *telecommunications traffic* between LECs and other telecommunications carriers." 47 C.F.R. § 51.701(a) (emphasis added). In light of the fact that 47 C.F.R. § 51.709(b), therefore, can only apply to "telecommunications traffic," under 47 C.F.R. § 51.701(a), 47 C.F.R. § 51.709(b)'s reference to "traffic" must be read to mean "telecommunications traffic."[5]

The *Level 3 Decision* on this point was reaffirmed earlier this year in a challenge by another CLEC, AT&T, in a recent arbitration dispute in Colorado.[6]

In the 2004 *AT&T Arbitration Order* the Board ruled that ISP traffic should not be attributed to Qwest when applying the relative use calculation:

> The practical implication of including ISP-bound traffic in the calculation of relative use factors is that Qwest will incur a substantial increase in its apportionment of the costs for the interconnection of trunks and facilities. This outcome would be in violation of section 252(d)(1) of the Act, which requires the setting of "just and reasonable" rates as compensation for the cost of providing interconnection. *AT&T Arbitration Order* at 23.

Level 3 attempts to distinguish the Board's decision in the *AT&T Arbitration Order* on the grounds that AT&T used a different form of interconnection and that it "appeared to agree" to the RUF formula. This effort overlooks the central policy decisions of the Board that apply here with equal force: that the "practical implication" of allocating to Qwest the cost of providing facilities so that a CLEC can receive ISP related traffic is "a substantial increase" in Qwest's costs of interconnection in violation of section 252(d)(1) of the Act and contrary to the public interest. *Id.* In its Arbitration Order in the present case, the Board correctly concluded that "there is nothing in

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[5] *Level 3 Communications v. Colorado Pub. Util. Comm'n,* 300 F. Supp.2d 1069, 1078 (D. Colo. 2003) (emphasis original) (*"Level 3 Decision"*).

[6] *AT&T v. Qwest Corporation* (D. Colo. 2005) (slip opinion attached as Exhibit A to Qwest's Opening Brief).

this record that that changes the Board's previous determination about ISP-bound traffic and RUF calculations." Arbitration Order at 15. Level 3's Petition for Reconsideration should therefore be denied.

4. The Board Should Reaffirm its Decision on Commingling of Traffic (Issue 1D).

Feature Group D trunks and Local Interconnection Service ("LIS") trunks are two different types of interconnection trunks. The undisputed evidence is that Qwest's billing systems do not have the capability of producing billing records for switched access traffic when such traffic is sent over LIS trunks. (R. 1030-31). This would be a particularly significant problem where Qwest is obligated to provide switched access records to independents and CLECs who terminate traffic delivered to Qwest by Level 3. (R. 932-934). Furthermore, the cost of upgrading the billing systems would exceed $1 million. (R. 1036). Given this undisputed evidence, it was completely appropriate for the Board to adopt Qwest's proposed language, which allows all traffic types to be carried over Feature Group D interconnection trunks.

Level 3's challenges to the Board's decision regarding commingling of traffic have no merit. First, Level 3 argues that section 251(c)(2) of the Act contemplates interconnection for the purpose of exchanging "telephone exchange service and exchange access" traffic. Level 3 Application at 8-9. Although that may be true, nothing in section 251(c)(2) or the FCC's regulations interpreting it requires Qwest to provide interconnection through a particular type of interconnection trunk. In this case, Qwest allows "telephone exchange service" traffic to be routed over local interconnection trunks and switched access traffic to be carried over Feature Group D trunks. If traffic types are to be combined, they must be combined over Feature Group D trunks. In either event, Qwest has clearly satisfied its obligation to provide interconnection for the routing of "telephone exchange service and exchange access."

Level 3's reliance upon 47 C.F.R. § 51.305 ("Rule 305") is also misplaced. Rule 305 sets forth the FCC's rules implementing section 251(c)(2) of the Act. Both Rule 305 and section

251(c)(2) require Qwest to allow interconnection "at any technically feasible point" within Qwest's network. They do not impose an obligation on Qwest to provide interconnection through a particular type of interconnection trunk. Indeed, they do not even address the manner of interconnection. Level 3 cites no authority to the contrary.

The FCC stated in its *Local Competition Order* that "a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit."[7] Level 3 has not offered to pay for the costs Qwest would incur to allow LIS trunks to carry switched access traffic.

Furthermore, Level 3's evidence concerning what other ILECs had agreed with Level 3 concerning interconnection is wholly insufficient to support any of the assertions Level 3 has made. Level 3 never introduced any of the agreements into evidence, presumably to conceal the concessions it had made to obtain what it wanted on various issues. Level 3 provided no ILEC testimony, correspondence or communications to support its bald assertion that "any associated billing issues were fully manageable." And Level 3 never introduced any evidence concerning the billing systems the ILECs had in place at the time that the agreements were negotiated. Thus, it was completely proper for the Board to give these unseen agreements little or no weight.

For these reasons, the Board should affirm its ruling on this issue adopting Qwest's proposed language regarding the commingling of traffic.

B. The Board's Decisions on Issue 3 (VNXX Traffic) are Legally Correct and Level 3 Has Provided No Basis for the Board to Reconsider those Decisions.

Level 3 advances two arguments on VNXX issues. First, it argues that the Board refused to make a decision on a necessary issue and therefore the Arbitration Order violates section 252.[8] Level 3 Application at 9-10. Second, it argues that Board erred in deciding the question whether

[7] *Local Competition Order* ¶199.

VNXX-routed ISP traffic is subject to the compensation regime of the *ISP Remand Order*. *Id.* at 10-11. Neither argument has merit.

1. Level 3's Assertion That the Board Did Not Resolve the Compensation Regime for VNXX Traffic Flies in the Face of the Arbitration Order.

Level 3 places great emphasis on the following language from the Arbitration Order: "The record demonstrates that the most important of the Board's concerns regarding the implementation of VNXX architecture in Iowa intercarrier compensation, is still relevant and the parties have offered little to alleviate that concern." Arbitration Order at 29, cited in Level 3 Application at 10. Somewhat inexplicably Level 3 suggests that this language creates a "Catch 22" with regard to VNXX, because Level 3 argued for a specific compensation regime to apply to VNXX calls to resolve the intercarrier compensation dispute between the parties on VNXX traffic (Level 3 Application at 10) but was rejected. Unwilling to accept that the Board decided the issue against it, Level 3 apparently wishes to argue that the Board did not rule on the intercarrier compensation implications of VNXX, and that this purported failure violates section 252.

Level 3 has tunnel vision. To accept this argument, the Board would need to ignore both its analysis and ruling on VNXX issues. In fact, the Board extensively analyzed the VNXX issue and explicitly resolved the three sub issues of Issue 3 by approving Qwest's language: "[T]he Board will approve Qwest's proposed language regarding compensation for ISP-bound and VNXX-routed ISP-bound traffic." Arbitration Order at 31.

Thus, the following contract language proposed by Qwest was adopted by the Board:

- Issue 3A relates to paragraph 7.3.6.3. By adopting Qwest's proposal, the Board approved the following language: "Qwest will not pay reciprocal compensation on VNXX traffic."
- Issue 3B relates to the definition of VNXX traffic. By adopting Qwest's language, the Board adopted the following definition:

> "VNXX Traffic" is all traffic originated by the Qwest End User Customer that is not terminated to CLEC's End User Customer physically located within the same

> Qwest Local Calling Area (as approved by the State Commission) as the originating caller, regardless of the NPA-NXX dialed and, specifically, regardless of whether CLEC's End User Customer is assigned an NPA-NXX associated with a rate center in which the Qwest End User Customer is physically located.

- Issue 3C relates to paragraph 7.3.6.1. By adopting Qwest's language, the Board adopted language that states: "ISP-bound traffic exchanged between Qwest and CLEC will be billed at the Board ordered bill and keep compensation rate."

The Board comprehensively analyzed and resolved the key legal issues before it. For example, the Board defined VNXX in general (Arbitration Order at 18), and provided a specific description of "VNXX-routed ISP-bound traffic." *Id.* at 19. The language approved by the Board is completely consistent with the Board's analysis of the issue. The Board also engaged in a comprehensive analysis of the *ISP Remand Order* and two governing federal circuit court decisions and concluded, that the term "ISP-bound traffic," as used in the *ISP Remand* Order, does not include "VNXX-routed ISP-bound traffic." *Id.* at 29-31. That analysis is likewise consistent with Qwest's proposed language. To suggest, in the face of the Board's analysis of the VNXX issue and its explicit adoption of Qwest's language, that the Board failed to meet its section 252 obligation to decide issues related to intercarrier compensation for VNXX traffic is sheer fantasy. The Board decided the issues.

2. The Board Properly Interpreted the *ISP Remand Order.*

Level 3's second argument is that the Board, by ruling that the *ISP Remand Order* applies only to local ISP traffic, misinterpreted the law regarding the breadth of the *ISP Remand Order.* Although Level 3 claims that the Board erred on this issue, it offers no new authority or argument, merely restating and citing arguments previously made in its briefs. Level 3 Application at 11. The Board correctly ruled on this issue and Level 3 has presented nothing new

to suggest that the Board should reconsider its ruling.[9]

C. The Board's Decisions Related to VoIP are Consistent with the Act and Rules and FCC Decisions. The Board Should Reject Level 3's Application for Reconsideration on Those Issues.

Level makes two arguments on VoIP issues. First, it challenges the Board's conclusion that voice calls between different local calling areas are "toll calls and must be treated as such." Level 3 Application at 11. Second, Level 3 challenges the Board's conclusion that the VoIP POP is the proper point from which to measure whether a VoIP call is a local call or a long distance call. *Id.* Level 3's arguments are not supported by law or fact and should be rejected by the Board.

1. Level 3's "Toll" Argument Should be Rejected.

a. Level 3 Wrongfully Criticizes the Board for Failing to Make a Decision on an Issue that Is Not Before the Board.

Level 3's first argument begins with the premise that all VoIP traffic is interstate in nature. Level 3 Application at 12. Level 3 implies that the Board lacks jurisdiction and thus overstepped its bounds in ruling on VoIP issues. This suggestion is disingenuous given the fact that Level 3 raised those precise issues in its Arbitration Petition and requested that the Board resolve them. In fact, the Board has explicit jurisdiction to resolve disputed language in a section 252 arbitration and that is exactly what it did in the Arbitration Order.

Based on its contention that VoIP traffic is by definition interstate in nature,[10] Level 3 also argues that only federal access charges could possibly apply to VoIP traffic. *Id.* That issue is not before the Board. It was not raised in the disputed language, it was not the subject of

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[9] Rather than restate its arguments on this point, Qwest's arguments are set forth in its Opening Brief at 9-22 and its Reply Brief at 2-10.

[10] In the *Vonage* Order, the FCC ruled that Vonage's DigitalVoice service was a jurisdictionally mixed service and that the FCC has exclusive jurisdiction under the Act "to determine the policies and rules, if any, that govern the interstate aspect of DigitalVoice service." Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket No. 03-211, ¶ 18 (November 9, 2004) ("*Vonage Order*").

testimony by either party, and it was not briefed. The issue that is before the Board is the question of how the call is measured for intercarrier compensation purposes—whatever intercarrier compensation regime applies. Qwest's language (originally in its VoIP definition, but then moved to paragraph 7.2.2.12) states that VoIP traffic "is subject to interconnection and compensation rules and treatment accordingly under this Agreement based on treating the VoIP Provider Point of Presence ("POP") as an end user premise for purposes of determining the end points for a specific call."[11] The Board approved that language and it resolves the issues in this docket.

b. Level 3's Reliance on the "Telephone Toll Traffic" Definition Is a Diversion from the Real Issue.

Level 3 next attempts to replay the argument that "VoIP calls are not excluded from the FCC's general definition of traffic subject to reciprocal compensation." Level 3 Application at 12. Thus, Level 3 claims that *all* VoIP traffic is subject to reciprocal compensation (or, in Iowa, subject to bill and keep). *Id.* This, of course, is a transparent attempt to convince the Board that no matter where the VoIP Provider POP is located or no matter where a VoIP call from Level 3 enters the PSTN, Qwest is obligated to transport and terminate the call throughout the LATA and may *never* collect either state or federal access charges. Under Level 3's position, if the VoIP Provider POP is in Des Moines, Qwest would bear the obligation to carry and deliver that traffic to a Qwest customer in Mason City, even though in identical circumstances an IXC would be subject to appropriate access charges.

[11] Brotherson Direct, R. 605. The specific issue before the FCC in the *Vonage Order* was whether the Minnesota Commission's effort to subject DigitalVoice service to regulations applicable to telephone service providers was lawful; the FCC preempted the state commission on that issue. Nothing in the *Vonage Order*, however, purports to define whether interstate or intrastate access charges would apply to uses of the PSTN for VoIP traffic. It simply was not an issue before the FCC and Level 3's unsupported assumption that interstate access charges would necessarily apply was not resolved by the FCC in the *Vonage Order*, nor was it an issue in this docket.

The fundamental problem with Level 3's advocacy is that it is based on the false but self-serving belief that the distinctions between local and long distance calling should not apply to VoIP traffic. Level 3 fails to provide any legal support for that proposition. In the face of Level 3's unsupported position are the clear statements of the FCC in the *ISP Remand Order*, not to mention section 251(g) of the Act, that the long-standing access charge regime that has existed in this country has neither been overturned nor supplanted by the Act or the FCC. *ISP Remand Order* ¶¶ 37-39. Qwest agrees that some VoIP traffic may be subject to terminating compensation (at least in those states where, unlike in Iowa, terminating compensation is allowed). In other words, in states that have not adopted bill and keep, terminating compensation would be paid on local VoIP calls (those where the VoIP Provider POP and the called party are in the same LCA), but would not be owed on interexchange VoIP calls (those where the VoIP Provider POP and the called party are in different LCAs). Thus, as the Board correctly ruled, where the use of the PSTN to terminate a VoIP call results in an interexchange call it is not only fair, but entirely lawful, that the entity that built the PSTN is allowed to collect proper charges for its use. For interexchange calls, the proper charges are access charges, and not reciprocal compensation.

The attempt to rely on the "telephone toll service" definition in the federal act simply demonstrates Level 3's effort to game the system. In this case Level 3 blatantly attempts to bypass the existing access charge regime by trying to characterize itself as only a provider of information services and not as an IXC, even though a major element of its service to VoIP providers is the transport of calls between LCAs on the PSTN (or, more accurately, to require Qwest to transport such calls on Level 3's behalf). Under the access regime, there is a clear distinction between a company providing local exchange service and one providing long distance services (in the case of RBOCs like Qwest, they must even be different companies for the provision of interLATA long distance). For other companies, local exchange and long distance services may be provided by the same company, but the rules are clear that in the provision of

long distance services the company is acting as an IXC. Thus, a call from one LCA to another is handed off to the IXC, which pays access charges to the company originating and the company terminating the call.[12] In providing its VoIP services, Qwest follows the rules, and requires that interexchange VoIP calls be handed off to an IXC. (R.871-72; Qwest Ex. 119). Level 3, however, attempts to avoid the access regime by simply refusing to acknowledge the necessity of an IXC for interexchange calls (or even to acknowledge that it is acting as an IXC in those circumstances). Mr. Ducloo was quite candid on this issue: "the Level 3 position is that for VoIP that traditional access charges and local boundaries don't apply. Geography doesn't matter." (Attachment D to Qwest's Opening Brief, at 183). Mr. Ducloo acknowledged that if the caller were a Phoenix PSTN customer making a call to Page (nearly 300 miles away), Qwest would receive terminating access charges from the customer's interexchange carrier (*Id.* at 184-85), even though, in both cases, "the work is the same." (*Id.* at 185). Yet Mr. Ducloo testified that when it offers VoIP, there is no associated IXC to which it hands interexchange traffic and that Level 3's position is that terminating access charges never should apply to its VoIP traffic. (*Id.* at 184-85, 187). He testified that Level 3 does not believe that IXCs are even relevant in the VoIP context, and that access charges should never apply to a VoIP call. (*Id.* at 187).

Level 3's "telephone toll service" argument is thus an attempt to divert attention from the real issue, which is its unfair attempt to offer interexchange calling without paying for the network services it uses to offer that service in contrast with its competitors who do pay. Level 3's attempt to blur the lines between local and long distance service and to deny that it is acting as an IXC are at the heart of its advocacy. Level 3 cannot by its own fiat turn calls that would otherwise be subject to access charges into something else. Under the federal access rules, access charges are to be imposed on IXCs providing interstate and foreign services. 47 C.F.R. § 51.69.5.

[12] The only notable exception to this is the ESP exemption that allows an ESP to originate and terminate traffic in a LCA without paying access, but it must buy local service in that LCA in the same manner that an end-user would do so.

Under Iowa Board rules, compensation for intrastate interexchange traffic shall be at the applicable tariffed access charges. 199 IAC §§ 22.14(1) and (2). Consistent with those rules, the Qwest Iowa access charges tariff requires that "[p]roviders of interexchange service, that furnish service between Local Calling Areas, must purchase services from this Tariff. . . . " Qwest Iowa Tariff No. 4, Access Service, § 1.1.A. Level 3 cites no law that supports the proposition that access charges cannot or should not apply to the company that is, in effect, acting as the IXC to carry interexchange traffic for a VoIP provider. Nothing in the Act, FCC rules, or state access tariffs and rules is intended to yield the anomalous and unfair result that Level 3 suggests.

2. The Board Correctly Applied the ESP Exemption.

Level 3 again recites its incorrect interpretation of the ESP exemption by claiming that it constitutes a complete exemption from access charges, no matter where the call originates or terminates on the PSTN. Level 3 Application at 12-13. The Board disagreed with Level 3, holding that neither the ESP exemption nor any other law entitles an ESP "to free transport to the terminating LCA." Arbitration Order at 33. Correctly applying the exemption, the Board also ruled that an ESP is not "allowed to connect to the terminating LCA as an end user under the ESP exemption if it does not have a physical presence in that LCA." *Id.*

Try as it might, Level 3 remains unable to cite authority for its view of the breadth of the ESP exemption. In its Application, Level 3 cites a paragraph from the *ISP Declaratory Ruling* in support of its interpretation. Level 3 Application at 13. But nothing in the quoted sentence or in the paragraph from which it was taken[13] purports to address the breadth of the exemption. Instead, that paragraph merely reaffirms that ISPs are ESPs, that they are entitled to the exemption, and that even though an ISP may connect to callers in the same LCA through local

[13] Declaratory Ruling in CC Docket No. 96-98 and NPRM in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 16 (1999) ("*ISP Declaratory Order*")

services (as opposed to access), the FCC retained jurisdiction over ISP traffic.[14] One will look in vain for anything in the *ISP Declaratory Order* that purports to interpret the exemption as Level 3 does. The Board correctly ruled the VoIP issues before it and should thus deny Level 3's request for reconsideration.

D. Level 3's Argument that the Board Failed to Make All Necessary Decisions Is Disingenuous. The Board Ruled that Qwest's Language on All Tier II Issues Should be Adopted.

Level 3's final point is that the Board failed to individually rule on each Tier II issue and thus provided no guidance on the contract language it intended to adopt related to those issues. Level 3 Application at 13-14. In light of Level 3's own characterization of the Tier II issues in its Petition, this argument is disingenuous.

In its Petition, Level 3 stated that the Tier I issues "are the most fundamental" issues, and that, while important, Tier II issues

> "*are derivative of fundamental points of business, law and policy presented by Tier I issues.* Thus, for example, should the Board agree with the FCC and several state and federal courts that Level 3 may exchange IP Enabled (or Voice over IP – 'VoIP') traffic over interconnection trunks, the approval of Level 3's proposed definition of 'call record' which would allow the Parties to identify and account for the exchange of such traffic is a relatively easy determination." *Id.* at 6-7 (emphasis added).

In other words, Level 3 itself argues that the derivative Tier II issues would simply flow from the decisions of the Board on Tier I issues. In fact, resolution of the Tier II issues does flow from the Board's decision on the Tier I issues. As numbered in Level 3's Petition for Arbitration, the Tier 2 issues begin at Issue 6. Issues 6 through 16 and 20 concern competing definitions that fit within other contract language proposed by each party. Since Qwest's proposed language was adopted on the Tier I issues, it necessarily follows that the Qwest's definitions would be used because

[14] This is simply another manifestation of the fact that the FCC characterizes ISP traffic as interstate (based on the location of the calling party and the location of the websites visited) for jurisdictional purposes, but at the same time allows an ISP to take advantage of the ESP exemption by buying local service out of local tariffs (just like an end user). The FCC's point is that even though the exemption allows the ESP to buy local service, the traffic remains interstate and thus subject to FCC jurisdiction.

they comport with the Qwest proposed language on the Tier I issues. Level 3's definitions do not. Issue 17 concerned revised forecasting language proposed by Qwest to which Level 3 never objected at hearing or in its briefs. Issue 18 concerned jurisdictional allocation factors which are no longer necessary since the Board has adopted Qwest's language on commingling of traffic. Issue 19 is moot because the Board continued its general policy that local traffic be terminated on a bill and keep basis. Issues 21 and 22 involved attempts by Level 3 to disclaim responsibility for costs incurred by Qwest and should be resolved in Qwest's favor since Level 3's other attempts at such disclaimers were rejected.

In the Arbitration Order, the Board noted that the Tier I issues had been narrowed to three primary issues: (1) interconnection architecture and cost responsibility related to that architecture, (2) VNXX arrangements, and (3) intercarrier compensation for VNXX and VoIP traffic. Arbitration Order at 2. The Board then noted that it would resolve those three issues, and that the resolution of the Tier II issues, consistent with Level 3's characterization of them as derivative, would flow from them: "Since the outcome of the 17 Tier Two issues remain dependent on the Board's decision in these three primary issues, the Board will not discuss the Tier Two issues individually. The parties should be able to determine the outcome of the Tier Two issues based on the Board's determinations in this order." *Id.*

The Board's resolution of all Tier II issues was in favor of the adoption of Qwest's proposed language. Although the Board did not directly say so, the only logical result is that the Board was likewise adopting Qwest's language on those issues as well.

Level 3 suggests that the Board failed to render adequate factual findings and that this constitutes error by the Board. *Id.* at 1. Level 3 fails to account for the fact that, while factual issues are often important in arbitration proceedings, the task of a state commission is a legal one: choosing the contract language that is most consistent with the requirements of the Act, and its underlying policies. The governing statute for arbitration proceedings is section 252, which does not impose a requirement of state commissions to enter factual findings. In fact, the only time a

state commission is required to enter "written findings" is when it rejects an agreement under section 252(e)(1). A federal district court decision in Colorado made this clear: "[T]he state commission must approve or reject the agreement, but is required to make written findings *only* as to any deficiencies in the agreement." *U.S. West Communications v. Hix,* 986 F.Supp.13, 16 (D. Colo. 1997) (emphasis added).

Particularly in light of Level 3's characterization of the Tier II issues, the Board's Arbitration Order meets all of the requirements of section 252. Finally, although Level attempts to re-argue some of the Tier II issue, Qwest simply refers the Board to its arguments on those points in its briefs.[15]

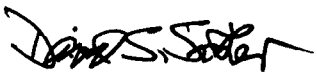
III. CONCLUSION

For all of the foregoing reasons, Qwest requests that the Board deny Level 3's Application and order the parties to adopt the interconnection agreement submitted by Qwest, with Qwest's language on disputed issues. Qwest also requests that the Board deny Level 3's request for additional briefing and oral argument. The issues in this case have been extensively briefed, with each party filing more than 100 pages each. Level 3's Application does not demonstrate the existence of any issues where the parties have not had more than adequate opportunity to fully present their factual and legal positions.

[15] Level 3 devotes a paragraph to a complaint that there is no definition of a VoIP POP. Yet in its briefs, it never suggested that the lack of such a definition was critical. The concept of POP is certainly one that is well established in telecommunications and need not be separately defined.

Respectfully submitted,

QWEST CORPORATION

by 

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CERTIFICATE OF SERVICE

ARB-05-4

I hereby certify that I have this day served the foregoing document on the following persons and parties:

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Dated this 19th day of January 2006.

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